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Supreme Court of the United States

———— TERM, 1931.

JOHN T. CALLAHAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LOUIS HALLE,
Attorney for Petitioner.

CORPORATE PRESS, INC., New York City

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Supreme Court of the United States

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JOHN T. CALLAHAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

1. That he was indicted in the United States District Court for the District of Delaware during the June term, 1928, and convicted on the 14th day of January, 1930. Thereafter, during the March term, 1930, an appeal was heard and after due deliberation, a decision and opinion filed October 29th, 1931.

That said indictment was in two counts. The second count may be disregarded as the United States Attorney elected to proceed solely on the first count, and withdrew the second (R., p. 164).

The first count as originally drawn is set forth at page five of the record. It is to be noted that this count purports to allege a violation of the provisions of section 593(b) of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922.

The petitioner was convicted on said count and sentenced to forfeit and pay to the United States a fine of $2,500 and be imprisoned in the United States Penitentiary at Atlanta for a term of one year and one day.

Although the indictment names three defendants, a severance was had as to all others and the trial proceeded as against your petitioner.

Count one of the indictment alleges a violation in that:

> "* * * the said defendants, Charles Newton, alias Charles R. Brown and Albert Knickle, both late of the District of Delaware, and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware, near the town of Lewes, Sussex County, and State of Delaware, certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit, Scotch malt, whiskey, gin, peach and apricot brandy, creme de menthe, kummel, sparkling burgundy and other alcoholic liquors, the exact kinds and amounts of which are to the grand jurors unknown—all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922—in that the said defendants did import and bring and assist in importing and bringing into the United States, to wit, within the territorial waters of the District of Delaware, from St. Pierre-Miquelon as aforesaid, the said merchandise, without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the said Tariff Act of 1922, and in that said merchandise was then and there by the said defendants imported and brought into the United States without payment of

the customs duties thereon as required by Schedule 8 of said Tariff Act of 1922, and in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3 of Title 2 of the National Prohibition Act, the said defendants then and there well knowing that said merchandise was so imported and brought into the United States contrary to law as aforesaid."

The Court after hearing argument on the motion demurring to the indictment rendered an opinion (R., p. 11), sustaining the demurrer to so much of the indictment which charged:

(a) the importation of the merchandise without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the said Tariff Act of 1922.

(b) That the said merchandise was then and there by the said defendants imported and brought into the United States without payment of the customs duties thereon as required by Schedule 8 of the said Tariff Act of 1922.

The case proceeded to trial on the indictment with (a) and (b) stricken out, and your petitioner found guilty on that count in the indictment which charged that the defendants Charles Newton alias Charles R. Brown and Albert Nichol did unlawfully, wilfully, knowingly and fraudulently import and bring into the United States and assist in importing and bringing into the United States from St. Pierre, Miquelon, into the territorial waters of the District of Delaware * * * in violation of Section 3, Title II of the National Prohibition Act.

Your petitioner contends that the learned Circuit Court of Appeals erred in refusing to grant the motion to dismiss the indictment on the ground that the same does not spell out an offense under section 593(b) of the Tariff Act of 1922. The Court below in overruling the demurrer to the

latter part of the indictment construed it to mean that the violation of law as charged in the indictment consisted of the violation of the National Prohibition Act. The Court so stated in its opinion (R., p. 12).

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, as Section 593(b), though later in time, is not inconsistent therewith. Section 593(b) of the Tariff Act of 1922 does not prohibit the importation of intoxicating liquors as does the National Prohibition Act, in fact, under Section 593(b) and under the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. Consequently the Tariff Act of 1922, and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act is error.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, the above cause, and a complete transcript of the record and all proceedings therein, that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

John T. Callahan

Petitioner,
By LOUIS HALLE,
Counsel.

Dated, New York, December 12, 1931.

United States of America,
Southern District of New York, } ss.:
County of New York,

JOHN T. CALLAHAN, being duly sworn, says: I am the petitioner herein; I have read the said petition and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

John T. Callahan

Subscribed and sworn to before me
this 17 day of December, 1931.

Gustave Halle

GUSTAVE HALLE
Notary Public, Kings Co. 114 Reg. No. 2115
Cert. filed in N.Y. Co. 264, Reg. No. 2R155
Commission Expires March 30, 1932

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well founded and should be granted by this Honorable Court.

Louis Halle

SUPREME COURT OF THE UNITED STATES.

JOHN T. CALLAHAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case and Facts.

The pertinent facts in connection with this application have been stated in the petition and will not be repeated except when necessary comment is made upon them in the course of the argument.

Questions Argued.

The questions that will be argued have already been presented in the petition and will be discussed on the following points:

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

POINT II.

The sentence of the Trial Court was erroneous and void by reason of Section 29 of the National Prohibition Act, which governs.

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof, is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, and though later in time, is not inconsistent therewith. Section 593(b) does not prohibit the importation of intoxicating liquors as does the National Prohibition Act, in fact, under Section 593(b) of the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. Consequently the Tariff Act of 1922 and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act was error.

The Court in rendering its opinion relies in the main on the case of

Bookbinder v. *United States* (C. C. A. 3) 287 Fed. 790.

The Court holds a correct interpretation of this case to be that since it was decided prior to the passage of the Willis-Campbell Act, and while in the opinion in that case Judge WOOLLEY suggested that the Prohibition Act may have repealed the provisions of the Tariff Act as it affected actual importation, the case was decided upon other provisions of the Tariff Act which were not affected by the unlawful importation provisions of the Prohibition Act.

The Willis-Campbell Act was passed November 23rd, 1921. The *Bookbinder* case, *supra,* was decided March 13, 1923, two years later. The indictment in the *Bookbinder* case, however, was returned in September, 1921, but the opinion, nevertheless, discusses the force and effect of both the Willis-Campbell Act and the case of

United States v. *Stafoff,* 260 U. S. 477,

on the subject matter at hand.

But of paramount importance is the statement in the *Bookbinder* case, *supra,* found at page 794:

> "And the same difference maintains between the case of *United States* v. *McKenzie* (D. C.) 283 Fed. 667, and the case at bar. There the Court held that the identical section (R. S. Sec. 3082) was repealed by the National Prohibition Act. In that case the charges of the indictment were the importation, transportation, and the smuggling of liquors, all of which offenses the National Prohibition Act, the later statute, specifically denounces and for which it provides specific penalties. The *McKenzie* case differs from the case at bar in that it dealt with importation of liquor while the case at bar has to do with receiving and concealing liquor unlawfully imported. About this the National Prohibition Act says nothing."

It would seem that the reasoning of the Circuit Court of Appeals in this Circuit in the *Bookbinder* case is controlling notwithstanding the passage of the Willis-Campbell Act or the decision of the United States Supreme Court in the *Stafoff* case. The fact that the merchandise involved is intoxicating liquor, the importation of which was prohibited by the National Prohibition Act, created an offense which did not exist under the old laws, and therefore the supplemental act did not change the complexion of Section 593(b) of the Tariff Act of 1922. The language

of the Willis-Campbell Act, and as this Court has observed in its opinion wherein it cites the holding of the United States Supreme Court in the *Stafoff* case, shows beyond doubt that the supplemental act refers only to

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force when the National Prohibition Act was enacted shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

It follows that such enactment cannot be invoked in the present case for the law involved herein is *Section 593(b) of the Tariff Act of 1922 which is not a law regarding "the manufacture and taxation of and traffic in intoxicating liquor."*

It is contended that the learned Circuit Court of Appeals has mistaken the force and effect of the decision of the United States Supreme Court in the *Stafoff* case, and has broadened the holding of that case beyond the scope of its decision and dicta. The *Bookbinder* case, *supra,* is still the law of this Circuit and is not in conflict with any other circuit's decision.

It is respectfully submitted that the Court erred in its construction of the case of

> *Gillespie* v. *United States* (C. C. A. 2), 13 Fed. (2d) 736,

regarding which the Court at page 4 of its opinion states as follows:

> "An importation takes place whenever merchandise is brought within the territorial waters of the United States with intent to illegally bring said merchandise into the country."

The Court in the case, *Gillespie* v. *U. S.*, *supra*, at page 737, states:

> "Plaintiffs-in-error, however, are not accused of 'running' this liquor, or of any offense under the National Prohibition Law; nor does that statute have any connection with their crime; except to render the bringing into the United States of the whiskey in the manner above described unlawful, for reasons not necessarily having a connection with revenue."

Further on the Court goes on to say:

> "The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to *'bring into* the United States.' It is in section 593 (a) that punishment is prescribed for one who 'smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,' etc."

And at page 738 of the case the Court expressly shows the circumstances under which Section 593(b) may be invoked for an unlawful importation of intoxicating liquors by definitely and conclusively stating as follows:

> "In fact, all the whisky still on the tug, while it was not yet smuggled, was in the United States and unlawfully brought there, because, as charged in the indictment, it was brought in without a permit."

This case is distinguishable from ours on the common ground with the case of

> *Keck* v. *United States*, 172 U. S. 434, 43 L. Ed. 505,

which reversed the lower Court and dismissed an indictment for the identical absence of an allegation of the

alleged illegality of the importation. A similar situation presents itself in our case where there is an absence of a statement in the indictment that the liquor was aboard the vessel within the territorial waters of the United States without a permit.

Yet the *Gillespie* case wherein the Court holds as *supra* cited that the goods would be brought into the United States contrary to law, does not hold that that would be contrary to Section 593(b) and it is conceded, and we argue and contend for the fact that it would be contrary to law but contrary only to the National Prohibition Act which condemns such importation. That this construction of the *Gillespie* case is a true one is apparent in the Court's statement relied on at page 738 where it states:

> "The first count in the *Keck* case was based on R. S. Sec. 3082 (Comp. St. Sec. 5785), substantially identical with section 593(b) of the Tariff Act of 1922. That count was held insufficient—and there was no dissent on this point—because of the failure to specify in the indictment in what way the importation was contrary to law. In the indictment before us it is specifically charged in the allegation that the importation was without the required permit."

Furthermore, in the *Gillespie* case the charge against the defendants was facilitating the transportation, concealment, etc., of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. This is not an offense under the National Prohibition Act. The Court does not pass upon the point involved in our case, and so much of the ruling as is dicta, is unquestionably in support of our contention. The real gist of the holding of the *Gillespie* case may be found at page 738:

> "However inartistic the indictment in this case may be, it is clear that it was intended to charge

> the offense created by section 593(b), and not that created by section 593(a). These defendants are not charged with having smuggled the goods, or with being accessories to the smuggling; they are charged with having facilitated the transportation of the goods after they had been smuggled, and with knowledge that they had been brought into the country contrary to law."

In that respect the indictment was treated identically as it was in the *Bookbinder* case, *supra.*

The National Prohibition Act does not denounce concealment or facilitation in transportation after illegal importation of intoxicating liquor.

The case of

McGill v. *United States*, 28 Fed, (2d) 572

seems determinative. The same considerations of the indictment and the proof govern here as in the *McGill* case, *supra,* and in

Keck v. *United States, supra.*

Can it with reason be held that if there were a permit to import the liquor in question that the facts nevertheless would substantiate a violation of Section 593(b) of the Tariff Act of 1922 in the absence of a showing that opportunity had been afforded for the payment of duties and that a customs barrier had been passed without such payment? In short, importation under the Tariff Act is not synonymous with or identical to importation under the National Prohibition Act. Under the former, merchandise at a definite point and within a definite time must be properly declared, and upon failure to comply, upon the passing of a customs barrier, the act of importation is complete. Under the latter, a mere carriage of intoxicating liquors for beverage purposes into the territorial waters of the

United States without a permit incurs liability under Section 3, Title II of the National Prohibition Act. No more has been shown than the coming into the territorial waters of the United States of a vessel upon which there was a cargo of intoxicating liquor. The demurror to the indictment was sustained insofar as the indictment referred to any acts other than the act of coming within the territorial waters with a cargo of intoxicating liquors.

The indictment having been stripped by the District Court's decision sustaining so much of the demurrer as refers to (1) the importation as contrary to law in that it was made without a permit from the Commissioner of Internal Revenue, (2) without payment of the customs duties thereon as required by Schedule 8 of the Tariff Act of 1922, leaves nothing except the allegation that the importation was in violation of Section 3, Title II of the National Prohibition Act. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. In fact, intoxicating liquors may be imported. In all the authorities cited both in the original brief of the appellant and in that of the government, whenever Section 593(b) of the Tariff Act of 1922 was invoked, there was present in the indictment and in the proof, facts showing the character of the violation directly contrary to some specific provision of the Tariff Act. *In that respect the case at bar is distinguishable from all those authorities, regardless of how they may be construed, for in none of them was there simply and solely an alleged illegal importation by virtue of the violation only of Section 3, Title II of the National Prohibition Act.*

It is respectfully urged that Congress intended that a fine be imposed of $500 as a maximum for the importation of intoxicating liquors on the dates specified in the indictment, that under the circumstances of this case and under the indictment as reduced by the Court's ruling on the de-

murrer, that the violation of law, if any, was a prohibition violation and that Congress has imposed the penalty in Section 29 of the National Prohibition Act. To invoke under circumstances such as these, in the face of an indictment such as this, Section 593(b) of the Tariff Act of 1922 is to subvert the direct command of Congress as expressed in Section 3, Title II of the National Prohibition Act and to invoke a more severe penalty by reason of the artifice of a pleader who has invoked a tariff regulation which Congress had no intent of using in a fact situation as presented here.

In the case of

United States v. *Dowling,* 278 Fed. 630,

the Court at page 641 discusses the effect of the passage of the Volstead Act on the existing statute, Section 3082 of the Revised Statutes which is substantially identical to Section 593(b) of the Tariff Act of 1922. The Court at page 641, states:

> "The fifth and sixth grounds of demurrer to count No. 4 of indictment 1424 show an additional reason why it is insufficient. These grounds are:
>
> "'(5) Section 3082 of the Revised Statutes of the United States, as applied to intoxicating liquors for beverage purposes, has been repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.
>
> "'(6) Section 3082, of the Revised Statutes of the United States, as applied to intoxicating liquor for beverage purposes, has been superseded by the National Prohibition Act.'
>
> "Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than sec. 3082 and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *U. S.* v. *Yuginovich,* 256 U. S. 450, 41

Sup. Ct. 551, 66 L. Ed. ...., the holding was as follows:

"'Existing penal statutes are repealed by later ones covering practically the same acts, but fixing lesser penalties.'

"Also see *U. S.* v. *Windham* (D. C.) 264 Fed. 376.

"Section 3082 is the smuggling statute, and it imposes a penalty of $5,000 and two years' imprisonment upon any one found guilty of knowingly assisting in smuggling. Section 3 of the Volstead Act prohibits importation of intoxicating liquors, and section 29 provides that, for violations where a special penalty is not provided, the punishment shall be a fine of not more than $500. So the ground is fully covered by the Volstead Act, as it is a later statute, and as the penalty prescribed by it is less than that prescribed by section 3082, R. S. section 3082 would also appear to come within the provisions of section 35 of the Volstead Act, which provides for the repeal of conflicting acts to the extent of the conflict."

It is evident from this opinion that the Court has intepreted the intent of Congress in passing the Volstead Act to be that such enactment was to make the act all-dominant and controlling so far as relates to the importation of intoxicating liquors. It appears illogical to assume that the Volstead Act which particularly relates to intoxicating liquors shall have been superseded by the Tariff Act of 1922 which is all-embrasive in its intendment.

We respectfully contend that the words "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 means contrary to some law which itself does not prescribe a penalty. It has no reference to any law which if violated prescribes the punishment therefor. This is particularly true where Congress as here, created the offense in Section 3, Title II of the National Prohibition Act and has imposed

the punishment for the violation. Furthermore, "contrary to law," as used in this said section and as held by this Court in this opinion refer to Section 3, Title II of the National Prohibition Act as being the law contrary to which the alleged importation was committed.

There is no showing in the indictment that the liquor in question was imported for beverage purposes, Section 3, Title II of the National Prohibition Act not prohibiting by its terms the importation of liquor for non-beverage purposes.

It is elementary that the facts of an indictment govern; that the pleader's nomination of a particular statute does not render the indictment invalid if such statute does not cover the fact situation. The Court nevertheless will proceed to sentence if a conviction is obtained under the applicable statute.

The indictment herein names Section 593(b) on a fact situation (after demurrer) which can only refer to the National Prohibition Act. Of course, the statement in the indictment "the said defendants then and there well knowing that such merchandise was so imported and brought into the United States as aforesaid," which immediately succeeds the statement, "in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3, of Title II of the National Prohibition Act," means exactly what it states, and that is to say, that the importation was in violation of the National Prohibition Act. The interpretation and construction of "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 may be correct, and yet this indictment in its language does not support such construction.

Section 593(b) of the Tariff Act does not fix a special penalty for the importation of intoxicating liquor. It does not deal specifically with intoxicating liquor, in fact, im-

portation of intoxicating liquor is not prohibited under the Tariff Act of 1922. It is only the importation of merchandise in general to which the Tariff Act of 1922, Section 593(b) thereof, relates. On the other hand, the National Prohibition Act specifically prohibits not the importation in general of merchandise but specifically of intoxicating liquor. It prescribes and fixes a penalty therefor. The penalty, like many others for violations of the terms of the National Prohibition Act, is found in Section 29 thereof. Indeed, if there were no penalty imposed under the National Prohibition Act for the importation of intoxicating liquors, the importation thereof would be no offense, for there can be no offense without a penalty.

United States v. *Seibert*, 2 Fed. (2d) 80.

If the National Prohibition Act was superseded with regard to importation of intoxicating liquors by Section 593(b), then there is no additional force and effect of the Jones Act which raises the punishment for the illegal importation of intoxicating liquors to five years' imprisonment and a fine of $10,000 and directs that the change be effective in regard to the National Prohibition Act without in any manner referring to Section 593(b) of the Tariff Act of 1922. The only extent to which Section 593(b) can be held to have superseded the National Prohibition Act is in reference to offenses which Section 593(b) specifically create and which are not to be found in the National Prohibition Act—otherwise, both statutes would be inconsistent.

POINT II.

The sentence of this Court was erroneous and void by reason of Section 29 of the National Prohibition Act which governs.

(a) The contention here made is that, assuming without conceding, that the indictment in the case at bar has in it all the ingredients essential to constitute the offense of importation denounced by the National Prohibition Act, that the sentence of the Court imposing a fine and imprisonment of one year and a day against the defendant was void, at least in so far as it exceeds the penalty imposed under the terms of the National Prohibition Act, Section 29. It has already been pointed out that Section 593(b) is a general statute which imposes a penalty for the importation of merchandise in general contrary to law. It is urged that contrary to law as used in Section 593(b) means contrary to such laws which do not provide for the imposition of a penalty for their infraction. Section 593(b) of the Tariff Act of 1922 is a general statute fixing a punishment therein for the violation of laws or enactments governing and controlling the manner in which merchandise in general may be brought into the United States. The failure to have a permit, the failure to pay duties as prescribed, and the failure to properly mark packages and stamp them, all of which are prescribed by law, and for none of which a penalty for the violation of which is prescribed: these are the laws which Section 593(b) may be invoked to impose its sanction upon, but for the violation of a statute which creates an offense and imposes a penalty—for such offenses it is contended that Section 593(b) may not be invoked unless it can be construed to be a repealer of such other statute or unless the intent of Congress can be gleaned from the two statutes

under consideration and the later statute interpreted as superseding the former one.

The National Prohibition Act denounces an illegal importation of intoxicating liquors. It prescribes the penalty therefor under Section 29 thereof.

In the case of

Baily v. *Allen E. Walker*, 2 Fed. (2d) 123 at page 124

we find this canon of statutory construction which applies to the case at bar:

> "It is elementary in the interpretation of statutes that specific provisions relating to a given subject shall prevail over more general ones relating to a class of which the particular subject is but a part, unless the context or some other proper basis of construction clearly shows a different legislative purpose."

See also:

United States v. *Zenith Radio Corp.*, 12 Fed. (2d) 614.

In the case of

Simon v. *Simon*, 26 Fed. (2d) 530,

at page 532, the Court holds:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as an exception to the general statute. *Ex parte Crow Dog*, 109 U. S. 556, 570, 3 S. Ct. 396, 27 L. Ed. 1030; *Rodgers* v. *United States*, 185 U. S. 83, 87, 88, 89, 22 S. Ct. 582, 46 L. Ed. 816."

That Congress clearly intended that Section 3 of Title 2 of the National Prohibition Act be applied to the illegal importation of intoxicating liquors becomes an unassailable fact when viewed in the light of the language of the Jones Law. By that enactment which in point of time was seven years later than the Tariff Act of 1922, we find Congress effected a change in the sanction under Section 29 with respect to, among other things, a prosecution for the importation of intoxicating liquor. By this enactment the penalty imposed for the offense of importation under the National Prohibition Act was increased to a fine not to exceed $10,000 or imprisonment not to exceed five years or both. To say that Congress intended the Tariff Act of 1922, Section 593(b) thereof to be used in a prosecution for an illegal importation of intoxicating liquor is to refuse to recognize the expression of the intent of Congress as exhibited in the Jones Act *supra*. Congress never intended the Tariff Act of 1922 to impose a sentence or a penalty for the illegal importation of intoxicating liquors in violation of the National Prohibition Act. As late as 1929 Congress, in enacting the Jones Law, was satisfied that the National Prohibition Act imposed a penalty for importation of intoxicating liquors. To hold, as the Trial Court did in this case, that Section 593(b) of the Tariff Act of 1922 superseded Section 29 on the ground that a specific penalty for the illegal importation is provided for in Section 593(b) is in effect a holding that importation of intoxicating liquors under the National Prohibition Act is no offense.

See

United States v. *Seibert, supra.*

Furthermore, under the Tariff Act of 1922, Paragraph 801, Schedule 8, which provides for the import duties on spirits, wines and other beverages reads as follows:

> "Nothing in this Schedule shall be construed as in any manner limiting or restricting the provisions of Title 27 (The National Prohibition Act as amended)."

This is an unequivocal expression of the intent of Congress that the Tariff Act of 1922 should affect its own field of legislation and in no manner trespass upon the terms of the National Prohibition Act.

Unless a punishment is provided, a statute does not create a crime. Furthermore, the Jones Act would be utterly ineffective with respect to importation of intoxicating liquor if the Court here is correct. Anyone commercializing on a large scale the importation of intoxicating liquors who would be indicted under the Jones Act for such importation could argue on the basis of the Court's decision in this case, that with respect to the importation of intoxicating liquors, the Tariff Act of 1922, Section 593(b) superseded importation under the National Prohibition Act and the penalty therefor. It would also follow that the Jones Act was a nullity so far as importation is concerned by reason of the fact that it effects a change in a statute, already superseded. In this connection another well-established canon of statutory construction effectively comes into play. We find it well stated in the case of

> *Washington Railway, etc.* v. *District of Columbia,* 10 Fed. (2d) 999, at page 1001:

> "It is a well established rule that repeals by implication are not favored, and that a general statute without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent."

At this point counsel reverts to Point I of this brief in which the respective roles to be played by Section 3, Title 2 of the National Prohibition Act, and Section 593(b) have been pointed out. The latter statute may be invoked as an aid to the enforcement of the National Prohibition Act, when coupled with the illegal importation, there is the receipt and concealment thereof after importation. Of course, Section 593(b) may be invoked for the illegal importation of intoxicating liquor, providing its illegality is shown to be in violation of the Tariff Act of 1922, in which case 593(b) may be deemed to be co-extensive in its application with Section 3, Title 2 of the National Prohibition Act. But we are not concerned with this phase of the acts under consideration for the reason that the indictment failed to incorporate in it any illegality embraced by the terms of the Tariff Act of 1922 after the demurrer to it had been interposed.

The statement in the indictment that the acts complained of were contrary to Section 593(b) of the Tariff Act of 1922 is a conclusion of the pleader and may be disregarded, and if the facts in the indictment are sufficient to state a cause of action and sufficiently inform the accused of the nature of the charge against him, such an indictment will be sustained under the proper statute applicable thereto.

Harper v. *U. S.*, 27 Fed. (2d) 77 at page 79:

> "The fact that the pleader has misstated the number of the section is immaterial, it being sufficient if the language fully states an offense denounced by the federal statutes. *Johnson* v. *Biddle* (C. C. A.) 12 F. (2d) 366 at 369; *Taylor* v. *U. S.* (C. C. A.) 2 F. (2d) 444. In the latter case it is held that reference by number to the wrong section of the Criminal Code as the one under which the

> indictment is brought does not affect or defeat the indictment. An indictment is nothing more than a pleading, and its sufficiency must be determined by the facts therein set forth. The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion which may or may not be correct, and neither adds nor detracts from the allegations."

While we seriously question the validity of the indictment even under the National Prohibition Act by reason of the failure to include the essential ingredient that the liquor was imported for beverage purposes, nevertheless, if the indictment can be justified at all, it can only be under the terms of the National Prohibition Act. The sentence therefore, upon conviction of the defendant should have been imposed under and in accordance with the terms of Section 29 of the National Prohibition Act. In imposing a sentence of imprisonment when the said section imposes a maximum a fine of $500, the Trial Court imposed a void sentence as it was without jurisdiction in doing so.

To raise an offense from the degree of a misdemeanor to that of a felony, Congress must specifically by statute state its intention so to do.

Under the National Prohibition Act, importation of intoxicating liquor prior to the Jones Act *supra*, was a misdemeanor, the punishment therefor being at maximum the fine of $500. Section 29 *supra* Section 541, Title 18, U. S. C. A., Cr. Code Sec. 335. If Section 593(b) may be invoked, a sentence of two years or a fine of $10,000 or both may be incurred. The violation of this statute, therefore, constitutes a felony. Nothing in Section 593(b) indicates any intention on the part of Congress to raise the crime of importing intoxicating liquors to the degree of a felony. It was a misdemeanor up until specific legis-

lation changing it into a felony was enacted by the Jones Act, *supra*.

See:

Ross v. *U. S.*, 37 Fed. (2d) 557.

(b) A conviction under an indictment based on a violation of the Prohibition Act and a sentence under Section 593(b) of the Tariff Act are inconsistent.

The Court, in holding that Section 593(b) superseded so far as the penalty is concerned, Section 29 of the National Prohibition Act regarding importation of liquor, was in error. For the purpose of this point, counsel will assume that Section 593(b) did effect a change in the law with regard to the importation of intoxicating liquors. Thus it will not be contended here that Section 593(b) found as it is in a separate body of law, wholly apart from and independent of the National Prohibition Act cannot, in the absence of a specific reference to the later statute, effect a change, even though it was enacted subsequent in time, and it will not at this time be contended that the raising of the sanction and the status of the offense from a misdemeanor to a felony or an infamous crime, cannot be accomplished without an unequivocal expressed intent found in the language of the enactment itself. But it will be entirely assumed, without conceding, that the Court was correct in its holding that penalties imposed under 593(b) superseded Section 29, and counsel wishes to point out to this Court the inevitable consequences that flow from such a holding in the light of the authorities on the subject.

The leading authority is the case of

United States v. *James Tynen*, 20 L. Ed. 153, 11 Wall. 88-95.

The pertinent language is as follows:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is given effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairbairn,* 3 How. 636; *Bartlett* v. *King,* 12 Mass. 537; *Com.* v. *Cooley,* 10 Pick. 37; *Pierpont* v. *Crouch,* 10 Cal. 315; *Norris* v. *Crocker,* 13 How. 429; Sedgw. Stat. Law, 126.

"Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the Court; it thus permits what the first law prohibits.

"Again; the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

"Again; the act of 1813 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated.

"One of the earliest cases on this subject is that of *Rex* v. *Cator,* reported in 3 Burrows, 2026. There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offense, a fine of 100 pounds and three months imprisonment; for the second offense, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offense, a fine for 500 pounds and twelve months' imprisonment; for the second offense the fine was 1000 pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis,* 1 Leach (C. C.) 271, it appeared that there were two statutes against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony.

"There are numerous cases in the modern reports to the same effect.' We will cite only one, which was decided in this Court, that of *Norris* v. *Crocker,* 13 How. 429. In that case the defendants were sued in an action of debt to recover the penalty of $500 upon the 4th section of the act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice, and persons escaping from the service

of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offenses the sum of $500, to be recovered by the claimant in an action of debt..

"Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. at L. 462) passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraces the offenses specified in the act of 1793, and creates new offenses, and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding 1000 pounds, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of $1000 for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending that had accrued to him; and that the Court would not favor repeals by implication. But the Court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was 'Not open to controversy, that when a new statute covers the whole subject of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that the former

statute is repealed by implication, as the provisions of both cannot stand together.'

"By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the Court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' *Md.* v. *R. Co.*, 3 How. 534. In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offense remaining for the Court to punish in virtue of that section."

It follows therefore, that 593(b), in consequence of the holding of the Court, if it is correct, acts as a repeal of the National Prohibition Act with respect to the importation of liquor. If that be so, the judgment of conviction based as it is in this case, on the violation of a statute, to wit, the National Prohibition Act, Section 3, Title 2 thereof, which has been repealed, if the holding of the Court is correct, must be set aside.

The case of

United States v. *Tynen, supra,*

so holds. The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions started and concluded while it was an existing law.

Ex parte McCardle, 7 Wall. 514, 19 L. Ed. 264;
Norris v. *Crocker*, 13 How. 429, 14 L. Ed. 210.

It is significant to note that the indictment charges that the illegality consisted of the importation of liquors contrary to Section 3, Title 2 of the National Prohibition Act. If that act has been repealed, there can be no illegality in the importation of the intoxicating liquors. It flows, therefore, from the assumption that the Court is correct in its holding, that the importation of intoxicating liquor could not have violated the National Probitition Act if that act was repealed by Section 593(b). It seems, therefore, that the only way in which the judgment of conviction can be justified is in the holding that the National Prohibition Act, Section 3, Title 2, was in force and effect at the time, and not repealed, and that the penalty thereunder provides for a maximum fine of $500 in accordance with Section 29.

Conclusion.

For the foregoing reasons it is submitted that the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court to supervise jurisdiction by issuing the Writ of Certiorari.

Respectfully submitted,

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